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Supreme Court of the United States,

OCTOBER TERM, 1975.

No. 75-1685

IOANNIS GEORGIOS KOLIOS, A/K/A
JOHN KOLIOS, A/K/A JOHN KOLIAS,
PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinion Below.

The March 30, 1976 opinion of the United States Court of Appeals for the First Circuit, as to which review by a writ of certiorari is sought by Ioannis Georgios Kolios herein, appears in ——— F. 2d ——— (1st Cir. 1976), no. 75-1264 (1st Cir. March 30, 1976) (see appendix A).

Jurisdiction.

This Court's jurisdiction to review the judgment of the United States Court of Appeals for the First Circuit in *Kolios* v. *Immigration & Nat. Serv.*, which was entered March 30, 1976, is based on 28 U.S.C. § 1254(1).

Question Presented.

Where a federal statute authorizes deportation of an alien whose conviction for a narcotic violation is final, does the setting aside of an alien's initial state conviction nullify the alleged finality of the conviction thereby "wiping out" the basis necessary for a valid deportation order?

Statutes Involved.

8 U.S.C. § 1105a provides in pertinent part:

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

. . . . . .

Venue

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit . . . .

Immigration Act of 1917, § 19, 39 Stat. 889 (1917).

8 U.S.C. § 1251 (Immigration and Nationality Act, § 241) provides in pertinent part:

(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . . . . .

(11) . . . has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in . . . marihuana, or who has been convicted of a violation of . . . any law or regulation governing or controlling the . . . sale . . . of . . . marihuana . . . .

8 U.S.C. § 1251(b) provides:

The provisions of subsection (a) (4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a) (11) of this section.

18 U.S.C. § 5006(e) provides:

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction . . . .

18 U.S.C. § 5010(b) provides:

If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this

subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or . . . .

18 U.S.C. § 5021(a) provides:

Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

28 U.S.C. § 1254 provides in relevant part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Tex. Civ. Code Ann., art. 4476-15, § 4.12 (Vernon 1973) provides:

(a) If any person who has not previously been convicted of an offense under this Act, or, subsequent to the effective date of this Act, under any statute of the United States or of any state relating to a substance that is defined by this Act as a controlled substance, is charged with a violation of this subchapter or is found guilty of a violation of this subchapter after trial or on a plea of guilty, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place him on probation on such reasonable conditions as it may require and for such period as the court may prescribe, except that the probationary period may not exceed two years.

(b) Upon violation of a condition of the probation, the court may enter an adjudication of guilt, pronounce sentence, and punish him accordingly. The court may, in its discretion, dismiss the proceedings against the defendant and discharge him from probation before the expiration of the maximum period prescribed for his probationary period. If during the period of his probation the defendant does not violate any of the conditions of the probation, then upon expiration of the probationary period the court shall discharge him and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without any adjudication of guilt, but a nonpublic record of the proceedings shall be retained by the director solely for use by the courts in determining whether or not, in subsequent proceedings, the person qualifies for conditional discharge under this section.

(c) A discharge or dismissal under this section shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law for conviction of a crime, including any provision for enhancement of punishment for repeat or habitual offenders. There may be only one discharge and dismissal under this section with respect to any person.

Tex. Code Crim. Proc. Ann., art. 42.12, § 7 (Vernon 1966) provides in pertinent part:

Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court . . . shall discharge the defendant . . . . [S]uch court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, ex-

cept that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Statement of the Case.

This is a petition for a writ of certiorari to review a 2-1 decision of the United States Court of Appeals for the First Circuit entered on March 30, 1976. *Kolios* v. *Immigration & Nat. Serv.*, ——— F. 2d ——— (1st Cir. 1976) no. 75-1264 (1st Cir. March 30, 1976 [hereinafter cited as *Kolios*].

Pursuant to 8 U.S.C. § 1105a, Ioannis Georgios Kolios petitioned the Court of Appeals for the First Circuit to review an order of deportation entered by an Immigration Judge on November 15, 1973 (see appendix B) and affirmed by the Board of Immigration Appeals on May 9, 1975 (see appendix C). The Immigration Judge had found the petitioner deportable under § 241(a)(11) (8 U.S.C. § 1251(a)(11)), of the Immigration and Nationality Act and ordered his deportation to Greece (see appendix B).

The petitioner is a single, male alien—a native and citizen of Greece. On March 13, 1968, he was admitted to the United States as a lawful permanent resident. His father, mother, and sister are all lawful permanent residents of the United States, and his father has recently become a naturalized citizen of this country. On June 15, 1971, the petitioner was inducted into the armed forces of the United States. While a member of the United States Army stationed in Texas, the petitioner was charged with a violation of Texas law prohibiting the sale of marijuana.

On May 1, 1972, the petitioner, then 20 years old, was initially convicted in the Bexar County District Court of Texas of the sale of marijuana in violation of the laws of the

state of Texas for which violation he was sentenced to five years in prison. The petitioner was not required to serve any of that sentence however, and, after serving a period of time on probation, in 1975, pursuant to Texas criminal procedure, Tex Code Crim. Proc. Ann. art. 42.12, § 7 (Vernon 1966), the initial conviction was set aside and the original indictment was dismissed. In Texas, save one exception, the setting aside of a conviction in this manner specifically releases the petitioner from *all* penalties and disabilities resulting from the crime of which he was initially convicted. That one exception permits evidence of the expunged conviction to be used only as a factor to be considered in determining punishment after a subsequent conviction for any crime.

Kolios has contended throughout the administrative and judicial proceedings below that since the initial state conviction upon which his deportation order is based was subsequently set aside, and the indictment dismissed, pursuant to a valid state procedure, the expunged conviction does not constitute a final conviction upon which a valid deportation order may be predicated.

On March 30, 1976, a majority of the United States Court of Appeals for the First Circuit, denied Kolios' petition to review the order of deportation entered by the Immigration Judge and thereby affirmed the decision of the Board of Immigration Appeals (appendix A).

Argument.

REASONS FOR GRANTING A WRIT OF CERTIORARI.

It is petitioner's contention that the United States Court of Appeals for the First Circuit has decided an important question interpreting federal law which has not been, but should be, settled by the United States Supreme Court.

Contrary to the philosophy expressed by the Supreme Court with regard to construing strictly congressional legislation dealing with deportation, the majority of the Court of Appeals refused to construe § 1251(b) strictly as to its effect or lack of effect upon § 1251(a)(11). As a consequence, the majority believed that when Congress amended § 1251(b) in 1956, so that executive pardons, or judicial recommendations against deportations made at or within 30 days after the time of sentencing, would not prevent deportation for narcotics offenses under § 1251(a)(11), it also intended (apparently by silent implication) to prevent the expungement of a conviction from wiping out the basis of deportability under § 1251(a)(11). The majority reluctantly concluded "that relief in such cases as this is properly a matter for the Congress" *Kolios,* opinion at 39, while at the same time rather ironically suggesting:

> that some flexibility would appear to be desirable; automatic deportation of all drug offenders, despite conviction for a minor offense, satisfactory completion of a probationary term, and erasure of the conviction by the concerned state, *would seem to serve no national interest.*

Id. at 39-40 (emphasis added).

In the dissenting opinion, however, Circuit Judge McEntee took a different approach to determine whether the statutory language in the 1956 amendment to § 1251(b) reflected congressional intent to prevent the expungement of a conviction from wiping out the basis of deportability under § 1251(a)(11). He indicated (*Kolios,* at 40) that he was more influenced by the consistent line of Supreme Court decisions which have held that where the severe penalty of deporation of an alien is involved, the Supreme Court

> will not assume that Congress meant to trench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. *Phelan,* 333 U.S. 6, 10 (1948). *See also Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214, 225 (1966); *Barber* v. *Gonzales,* 347 U.S. 637, 642 (1954). *Cf. Guiseppi* v. *Walling,* 144 F. 2d 608, 624 (2d Cir. 1944) (L. Hand, J.).

Judge McEntee went on to point out that strictly construing 8 U.S.C. § 1251(b) as to its intended effect on § 1251(a)(11) does not result in the conclusion reached by the majority. On the contrary, he asserted that a strict construction of congressional language and intent would permit giving effect to the expungement of state convictions pursuant to state laws for purposes of wiping out the bases of deportability under § 1251(a)(11). *Kolios,* opinion at 40-41 (McEntee, J., dissenting).

In view of Judge McEntee's persuasive dissent in *Kolios,* which is consistent with the Supreme Court's position with regard to statutory interpretation in deportation cases, and taking into account the acknowledged "sympathetic" nature of the petitioner's case, *Kolios,* opinion at 35, 40, which arises at a time when there are mixed reports in this country as to the harmful, or even medically beneficial effects of marijuana (see recent report on marijuana as a cure for glaucoma), as well as a great diversity of opinion in this country as to its criminality (note several states have decriminalized the possession of marijuana, *e.g.,* Oregon, Maine), this case presents an excellent opportunity both to resolve conflicting judicial interpretations of a congressional statute and to reaffirm respect for a state's post-

conviction procedures and determinations as they relate to the medical, legal, and emotional controversy surrounding marijuana.

A. *Under 8 U.S.C. § 1251(a)(11) (§ 241 (a)(11) of the Immigration and Nationality Act) which provides for the deportation of an alien "convicted" of a narcotic violation, the conviction contemplated must be final. And the determination of the finality of a state conviction is a matter of state law.*

1. *Under 8 U.S.C. § 1251(a)(11) (§ 241(a)(11) of the Immigration and Nationality Act) which provides for the deportation of an alien "convicted" of a narcotic violation, the conviction contemplated must be final.*

Although only a few courts have addressed the specific issue raised by this petitioner, *Gonzalez de Lara* v. *United States,* 439 F. 2d 1316 (5th Cir. 1971) [hereinafter cited as *Gonzalez de Lara*]; *de la Cruz-Martinez* v. *Immigration and Naturalization Service,* 404 F. 2d 1198 (9th Cir. 1968), *cert. denied,* 394 U.S. 955 (1969) [hereinafter cited as *de la Cruz-Martinez*]; *Kelly* v. *Immigration and Naturalization Service,* 349 F. 2d 473 (9th Cir.), *cert. denied,* 382 U.S. 932 (1965) [hereinafter cited as *Kelly*]; *Garcia-Gonzales* v. *Immigration and Naturalization Service,* 344 F. 2d 804 (9th Cir.), *cert. denied,* 382 U.S. 840 (1965) [hereinafter cited as *Garcia-Gonzales*], there seems to be general agreement with the proposition that the conviction, referred to in the above statute and upon which the deportation of an alien is to be based, must be a final one. *Will* v. *Immigration and Naturalization Service,* 447 F. 2d 529 (7th Cir. 1971) [hereinafter cited as *Will*].

> [W]e must conclude that conviction *per se is not sufficient to justify a deportation order* but that a *final curtain* must have been drawn in the criminal proceedings.

Id. at 532 (emphasis added).

2. *The determination of the finality of a state conviction is a matter of state law.*

In *Holzapfel* v. *Wyrsch,* 259 F. 2d 890, 891 (3d Cir. 1958), the court said:

> In deportation cases where a state crime is involved we have to look to the law and procedure of the state to interpret what happened in the state courts.

Accord, United States ex rel. Freislinger on behalf of Kappel v. *Smith,* 41 F. 2d 707, 708 (7th Cir. 1930).

Furthermore, the Third Circuit Court of Appeals in *Sawkow* v. *Immigration and Naturalization Service,* 314 F. 2d 34 (3d Cir. 1963), has extended total respect to a state's post-conviction procedures and determinations which affect the finality of an alien's conviction of a state crime:

> [N]o contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of *non vult* together with the judgment of conviction, and subsequently dismissing the indictment. *Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment.*

Id. at 37 (empahsis added).

That is precisely the situation in this case. The offense of which the petitioner was initially convicted is clearly a state crime. Pursuant to the Texas statutory procedure, the initial conviction has been set aside and the indictment dismissed. There has been no attack upon the validity of the Texas statute authorizing that procedure. Indeed, there are no grounds for such an attack. The procedure is a matter of state law, and there can be no claim that the state court has exceeded its jurisdiction or abused its discretion in following the legislatively prescribed procedures for setting aside the conviction. It follows that the effect of setting aside the conviction in this case should be "as if the grand jury had never returned an indictment." Notwithstanding the petitioner's firm belief that the determination of the finality of a state conviction is a matter of state law, a finding that the meaning of the term "convicted" and hence the related determination of its finality is a matter of federal law does not necessarily mean that expungement of a state conviction pursuant to a state statute does not "wipe out" the finality of that conviction for deportation purposes under federal law. *Cf. Pino* v. *Landon,* 349 U.S. 901 (1955), *rev'g, Pino* v. *Nicolls,* 215 F. 2d 237 (1st Cir 1954), discussed *infra* at 18-21 of this petition.

B. *The action prescribed under the Texas statute, Tex. Code Crim. Proc. Ann. Art. 42.12, § 7 (Vernon 1966), whereby an alien's initial conviction of a narcotic violation may be set aside and the original indictment dismissed, nullifies the alleged finality of the alien's initial conviction for purposes of deportation under 8 U.S.C. § 1251(a)(11).*

Although it seems fairly clear that determination of the finality of a state conviction is a matter of state law, it has been argued that the expungement of a state conviction pur

suant to a state statute does not nullify the alleged finality of an alien's initial conviction for purposes of deportation.

By enacting Tex. Code Crim. Proc. Ann., art. 42.12, § 7 (Vernon 1966), the state of Texas has established a procedure whereby upon the satisfactory fulfillment of conditions of probation, the court shall discharge a defendant and may then set aside the initial conviction and dismiss the original indictment.

For reasons which we shall examine closely, the Board of Immigration Appeals in this case decided that the expungement of the petitioner's initial conviction pursuant to Texas criminal procedure did not nullify the alleged finality of the conviction and thus did not eliminate the basis of deportability. In its opinion the Board of Immigration Appeals cited several cases upon which it seemed to rely in support of its decision: *Matter of A ——— F ———*, 8 I. & N. Dec. 429 (1959) (Att'y Gen.) (dictum); *Garcia-Gonzales; de la Cruz-Martinez;* and *Gonzalez de Lara.* The Court of Appeals for the First Circuit in upholding that decision also cited with approval those cases as the judicial precedents which supported the Board's position. *Kolios,* opinion at 33 and 34n.1.

Since two of those decisions, *de la Cruz-Martinez,* 404 F. 2d at 1200, and *Gonzalez de Lara,* 439 F. 2d at 1318n.9, both cite with approval the *Garcia-Gonzales* case, which in turn strongly relies upon the Attorney General's dictum in *Matter of A ——— F ———*, the rationale of the 1959 Attorney General's opinion becomes increasingly important. We are convinced that reliance by the Board of Immigration Appeals on, and the First Circuit Court of Appeals approval of, the above cited 1959 Attorney General's dictum and its progeny is logically unwarranted. *Accord, Kelly* v. *Immigration and Naturalization Services,* 349 F. 2d 473, 475 (9th Cir. 1965) (Ely, J., dissenting). *See also Kolios,* opinion at 40-42 (McEntee, J., dissenting).

Looking more closely at that decision, the Attorney General was convinced by the history of § 241(a)(11) that

> Congress did not intend that aliens convicted of narcotic violations should escape deportation because . . . the State affords a procedure authorizing a *technical erasure* of the conviction . . . . [He went on to say] I believe that Congress intended the inquiry to stop at the point at which it is ascertained that there has been *a conviction in the normal sense* in which the term is used in Federal Law. See Berman v. United States, 302 U.S. 211 [1937]. (A defendant is convicted even though the trial court, after imposing sentence, has placed the defendant on probation.) Of course, if the conviction is still subject to reversal by the *usual* processes of appellate scrutiny, the statute is *not* satisfied . . . . I, therefore, regard it as immaterial for the purposes of § 241(a)(11) that the record of conviction has been cancelled by a state process . . . .
>
> Moreover, to follow the Board's [the Board of Immigration Appeals *original*] view would make the deportability of the alien depend upon the *vagaries* of state law. It has been said that only in California and a few other States is provision made for the cancellation of a record of conviction or for the withdrawal of a plea of guilty, upon the termination of probation . . . . And § 1203.4 of the California Penal Code . . . has been characterized as "*without parallel* in the legislation of any other state" in providing for a release of the probationer from all penalties and disabilities resulting from conviction . . . . *It is hardly to be supposed that Congress intended,* in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions, which, like California, provide for the expungement of a record of conviction upon the termination of probation.

Matter of A ——— *F* ———, 8 I. & N. Dec. at 445-446 (Att'y Gen.) (dictum) (emphasis added).

Respectfully, it can be remembered from relatively recent events that what has been a convincingly clear interpretation of a congressional statute to a United States Attorney General has not always been the actual interpretation intended by Congress (*e.g.,* Attorneys General Kennedy and Mitchell erroneously interpreted the congressional statutes relating to wiretapping). Moreover words like "technical," "normal," "usual" and "vagaries" as used in the above opinion are so broad that if they were subjected to reasonable qualifications the significance of the Attorney General's opinion and hence its value as authority on this issue would be minimal.

Analyzing the Attorney General's opinion it certainly cannot be contended that where a state has established procedures to set aside a conviction and dismiss an indictment, that *in every instance* the result is a "technical erasure" of the conviction. Such a contention would be unreasonable. *Cf. Mestre Morera* v. *United States Immigration and Naturalization Service,* 462 F. 2d 1030, 1032 (1st Cir. 1972) [hereinafter cited as *Mestre Morera*]. However, a fair reading of the Attorney General's opinion would seem to lean toward such an interpretation.

Similarly, the illustration offered by the Attorney General to explain what is a "normal" conviction is too simplistic. It clearly does not go far enough. *Berman* v. *United States,* 302 U.S. 211 (1937), cited in his decision, stands for the proposition that a defendant is convicted even though the trial court, after sentence is imposed, has placed the defendant on probation. Yet, even under those circumstances, if the conviction of the defendant is subsequently reversed

and set aside on appeal, certainly there would *not* be a conviction in the "normal sense." In fact, to be fair, the Attorney General specifically acknowledges that very exception to his rigid rule concerning the required finality of a conviction for deportation purposes, when he goes on to say: "*Of course,* if the conviction is still subject to reversal by the *usual* processes of appellate scrutiny, the [deportation] statute is *not* satisfied."

Under a rigid interpretation of that language, perhaps it may be argued that if the conviction is subject to reversal by an "unusual" rather than a "usual" process of appellate scrutiny, then the requirement of finality in 8 U.S.C. § 1251(a)(11) *would be satisfied.* Leaving aside for a moment the rather weighty considerations that attend a determination of what is "usual" and what is "unusual," it is submitted that there is no rational basis for the above argument concerning the effect of an "unusual" process of appellate scrutiny because there is no justification for distinguishing between "usual" and "unusual" processes in the first instance. Typically, the end result of either a "usual" or an "unusual" process of review is to affirm a conviction or to set it aside. If a state chooses to establish specific procedures to be followed in order to determine whether a conviction should be affirmed or set aside, who can say with any degree of certainty that such a process of scrutiny is "unusual"? What was arguably "unusual" ten years ago in the area of rights of criminal defendants, has since been held by the Supreme Court of the United States to be mandated by the Constitution.

And Judge Ely in his dissenting opinion addresses the contention of the Attorney General concerning the "vagaries of state law," and points out the shallowness of his argument:

> Inherent in our system are "vagaries" and "niceties and nuances" of state laws. One might find himself running afoul of the anti-gambling laws of many states and yet, for the same act, to have committed no crime in the state of Nevada. When the Attorney General writes that "only in California and a few other states is provision made . . . for the withdrawal of a plea of Guilty, upon the termination of probation.", it cannot follow that this pioneering of California and "a few other states" in the penal field is necessarily evil. . . . I cannot see that respecting the "vagary" of the California expungement statute as interpreted by the California courts is more grievous than the recognition of the "vagaries" and the "niceties and nuances" of different applications of the same law with respect to different crimes and according to different opinions of the Board of Immigration Appeals and the Attorney General of the United States. *If the Board and the Attorney General are to say, as they do, that an alien may be convicted in California of the most heinous crime and yet escape deportation by expungement of the record of that crime under the California law, then one who has been charged with possessing a marihuana cigarette should be spared from exile by consistent application of the same benevolent statute.* Differing interpretations and applications of the California statute constitute, in sum, a trap for those unlearned in the "niceties and nuances" of the law.

Kelly, 349 F. 2d at 479-480 (Ely, J. dissenting) (emphasis added). What Judge Ely said in that case applies with equal force here. Similarly in *Kolios,* Judge McEntee expressed his view that

> Congress has clearly bargained for and manifested an acceptance of the variety that necessarily flows from making deportation dependent on state convictions. . . . Hence . . . we should be reluctant to strain toward uniformity where Congress has clearly countenanced variety through a system which partially relies on state laws.

Kolios, opinion at 41-42 (McEntee, J., dissenting). *See, e.g.,* 18 U.S.C. App. § 1202(c)(2); 18 U.S.C. § 1955(b)(1)(i).

Notwithstanding the questionable language used by the Attorney General in an attempt to convey his reasoning, it appears that he based his entire decision solely on his also questionable interpretation of the congressional history surrounding 8 U.S.C. § 1251(a)(11).

Interestingly enough, with regard to that congressional history the Seventh Circuit Court of Appeals as recently as 1971, said:

> *The parties have not cited, nor have we found,* anything of significance in the legislative history of the Act casting light on the precise concept Congress sought to embody by the use of the term "convicted" in Section 241(a)(11).

Will, 447 F. 2d at 531 (emphasis added).

Recognizing this, the court in *Will* quoting from a case decided by the First Circuit Court of Appeals in 1954, *Pino* v. *Nicolls,* 215 F. 2d 237 (1st Cir. 1954), *rev'd on other grounds, Pino* v. *Landon,* 349 U.S. 901 (1955), said that

> the meaning of the word "convicted" is a federal question to be determined upon due consideration of the policy which § 241(a)(4) [substantially similar to § 241(a)(11)] . . . was designed to serve. *Pino* v. *Nicolls,* 215 F. 2d 237, 243 (1st Cir. 1954). . . .

Turning to *Pino* in an effort to determine what that congressional policy is in order to have an idea of the factor to be considered in determining the meaning of the word "convicted," we find that the First Circuit said in *Pino*:

> The object [of § 241(a)(4)], of course, is to get rid of aliens with socially undesirable criminal traits.

Id. at 243.

For an indication of what might be correctly described as an "alien with socially undesirable criminal traits" we need only look at the circumstances in the *Pino* case. There two deportation proceedings were involved. The first proceeding which began in 1938 was pursuant to § 19 of the Immigration Act of 1917, 39 Stat. 889 (1917). That statute required that the alien must have been sentenced more than once to imprisonment for a term of one year because of a conviction of any crime involving moral turpitude. *Id.* at 239. The proceeding was based upon (1) a 1928 conviction for carnal abuse of a female child for which offense the defendant was sentenced to 5 years and a day in the Massachusetts Reformatory; (2) a 1938 conviction for breaking and entering with intent to commit a felony for which offense the defendant was sentenced to three to four years in the Massachusetts State Prison; and (3) a 1938 conviction for illegal possession of burglary tools for which offense the defendant was sentenced to three to four years in the Massachusetts State Prison to be served consecutively after the three to four years sentence for breaking and entering. Shortly after the 1938 convictions, deportation proceedings were begun. However, in 1949 before the unexplicably slow deportation proceedings had concluded the governor of Massachusetts pardoned Pino for the two 1938 convictions, thereby wiping out the basis for deportability under § 19 of the Immigration Act of 1917. *Id.*

In 1953 a second deportation proceeding was instituted pursuant to § 241(a)(4) of the Immigration and Nationality Act of 1952 which provided for deportation of an alien convicted of two crimes involving moral turpitude regardless of whether or not the alien was confined therefor. *Id.* at 239-240. That proceeding was based upon (1) the 1928 conviction to which reference has previously been made and (2) a 1949 conviction for petty larceny for which offense the defendant was sentenced to one year in the House of Correction. After waiving all of his appeal rights related to the 1949 conviction, Pino was placed on probation for one year. *Upon satisfactory completion of his probation,* his sentence was revoked and the 1949 case placed "on file" without, however, revoking the original finding of guilty.[1] *Id.* at 240. In the deportation proceedings, Pino argued that since the 1949 case was "on file," the conviction lacked finality and could not be used as one of the two convictions necessary for deportation under § 241(a)(4). *Id.* at 242.

Upon review of the decision of the Board of Immigration Appeals affirming the order of deportation in the second proceeding, the First Circuit Court of Appeals, after referring to Pino's long police record and to his continuous brushes with the criminal law said, "Pino has shown himself to be a particularly undesirable alien if ever there was one." *Id.* at 246-247. *A fortiori,* the First Circuit Court of Appeals concluded that Pino was the

[1] The "on file" status meant that the case remained on the records of the court *but no further action would normally be taken.* However, it was theoretically possible that the case could again be called up and a sentence imposed, at which time the defendant-alien could appeal from the sentence so imposed and secure a trial *de novo* in the Massachusetts superior court.
Will, 447 F. 2d at 531 (emphasis added).

type of alien with socially undesirable criminal traits that Congress intended "to get rid of." Taking that factor into consideration in determining whether or not the "on file" status of the 1949 case removed the finality of the 1949 conviction for deportation purposes, the First Circuit held that it did not.

Yet on certiorari to the United States Supreme Court, the Supreme Court held:

> On the record here we are unable to say that the [1949] conviction has attained such finality as to support an order of deportation within the contemplation of § 241 . . . . The judgment is reversed.

Pino v. *Landon,* 349 U.S. 901 (1955), *rev'g Pino* v. *Nicolls,* 215 F. 2d 237 (1st Cir. 1954).

If the Supreme Court of the United States, clearly aware of the policy which § 241 was designed to serve, could hold that the speculative results of the unusual Massachusetts procedure of putting Pino's 1949 conviction "on file" nullified the conviction as a matter of federal law for purposes of deportation, then surely where an individual, as the record here shows, has been (1) involved *only once* with the authorities and (2) involved in an offense over which there is a great diversity of opinion in this country as to its criminality and (3) more importantly, where the initial conviction has been set aside, expunged, wiped out for state purposes, as opposed to merely being put "on file," the finality of that conviction should be nullified as a matter of *both* federal and state law.

This example of the strict construction placed upon the meaning of the term convicted and the need for its finality by the Supreme Court of the United States is in stark contrast with the loose construction given to those mat-

ters by the Attorney General who erroneously believed that such a loose construction was dictated by the congressional history of § 1251(a)(11). Moreover, this example is equally distinct from the liberal interpretation of what constitutes a final conviction employed by the majority of the First Circuit Court of Appeals in *Kolios*. *Kolios,* opinion at 39.

A better result, and one that is more in line with the apparent Supreme Court philosophy in this area, was reached by the First Circuit Court of Appeals in *Mestre Morera*. There it was held that the setting aside of a youthful offender's conviction, if he responds satisfactorily to treatment under the Youth Correction Act (18 U.S.C. § 5000 et seq.) wipes out the finality of the conviction and relieves him of a record tainted by such a conviction, and hence free from being subject to deportation because of that initial conviction. *Mestre Morera,* 462 F. 2d at 1032.

In fact, the First Circuit Court of Appeals specifically concluded in that opinion that if Congress had intended a certificate setting aside a conviction to be inoperative, with respect to § 241(a)(11), *it would have expressly said so. Id.* Not only did Congress fail to expressly say that the setting aside of a youthful offender's conviction would be inoperative with respect to § 241(a)(11), but it failed to expressly say that the setting aside of *any* conviction *by a valid state procedure* would be inoperative with respect to § 241(a)(11).

As Judge McEntee pointed out in his dissent in *Kolios,* the Court of Appeals in *Mestre Morera* followed the Supreme Court's rule of strictly construing a deportation statute and held that expunction of a conviction under the Federal Youth Correction Act nullified the finality of a youthful offender's conviction for deportation purposes.

Judge McEntee asserted that, despite the majority's hesitancy, a similarly strict construction is mandated under these circumstances, not only to give effect to the expressed concerns of the Supreme Court in deportation matters, but also to give effect to Congress' obvious concern with the legitimate goal of stimulating rehabilitation which is behind every expungement statute, state as well as federal. *Kolios, opinion at* 41 (McEntee, J., dissenting).

Despite the force of the above reasoning, it is submitted that, as Judge Ely pointed out in his dissent in *Kelly,* it simply makes imminently greater sense to look to the state that convicted the individual in the first place, to see how the state views the conviction. *Kelly,* 349 F. 2d 475-477 (Ely, J., dissenting). Both *Holzapfel* and *Sawkow* support the proposition that

> In deportation cases where a state crime is involved we have to look to the law and procedure of the state to interpret what happened in the state courts.

Holzapfel v. *Wyrsh,* 259 F. 2d 890, 891 (3d Cir. 1958); *see Sawkow* v. *Immigration and Naturalization Service,* 314 F. 2d 34, 37 (3d Cir. 1963).

In Texas, John Kolios has no conviction standing against him.

Interestingly enough, prior to the 1959 opinion of the Attorney General, the Immigration and Naturalization Service and the Board of Immigration Appeals both held that state expungement of a conviction for crimes involving moral turpitude (§ 1251(a)(4)) or involving narcotics offenses (§ 1251(a)(11)) nullified the finality of the conviction for purposes of deportation. *See Matter of A ——— F ———,* 8 I. & N. at 432; *Kolios,* opinion at . And this was the state of the law as far back as 1941. *Matter of A ——— F ———,* 8 I. & N. at 433.

However, as pointed out by the Court of Appeals in *Kolios,* in 1956 Congress amended § 1251(b), under which deportation for crimes involving moral turpitude could be avoided by an executive pardon or by a judicial recommendation against deportation made at or within 30 days after the time of sentencing, to make it clear that the section was inapplicable to the narcotics offenses described in § 1251(a)(11). The majority in *Kolios* postulated that in 1959 the Attorney General had reasoned that the progressive strengthening of deportation laws affecting aliens involved in narcotics, capped by the 1956 amendment to § 1251(b), evidenced a national policy which would no longer permit such a flexible interpretation of "convicted" as to recognize a subsequent expungement under state procedures having nothing to do with the merits of a case. *Kolios,* opinion at 34-35.

Judge Ely's interpretation of congressional intent in *Kelly,* however, provides a more logical and rational foundation for a conclusion opposite to that reached by the Attorney General. Commenting upon the 1956 amendments to 8 U.S.C. § 1251, Judge Ely said:

> It appears that the Congress intended that an alien should not benefit from a character of executive or judicial forgiveness which might be, and possibly had been, granted hastily and improvidently. The amendments, construed reasonably in favor of the alien, *do not* reach so far as to *prohibit successful recourse to a state procedure dependent upon the successful meeting of probationary requirements with resulting clear evidence of rehabilitation and court review,* not only *of the history* which was thought to justify probation in the beginning, but also of the *subsequent conduct upon which would rest the order* dismissing the original charge and *releasing the alien from disabilities.*

Kelly, 349 F. 2d at 479 (Ely, J., dissenting) (emphasis added). *Accord, Kolios,* opinion at 41 (McEntee, J., dissenting).

In an attempt to bolster the Attorney General's supposition with regard to congressional intent, it may be pointed out that the majority of the Ninth Circuit Court of Appeals in *Garcia-Gonzales* also felt that "Congress intended to do its own defining [of 'conviction'] rather than leave the matter to variable state statutes." *Garcia-Gonzales,* 344 F. 2d at 807. However, the primary basis for that court's assertion concerning congressional intent with regard to the definition of conviction is revealed later in its opinion:

> Our duty, taking into account applicable rules of construction, is to ascertain the intention of Congress. *We agree with the Attorney General as to that intention,* in reference to aliens convicted of offenses mentioned in subdivision (11).

Id. at 810 (emphasis added). Thus we come full circle back to the Attorney General's opinion which we believe is erroneous.

We believe that we have raised sufficient *doubts* as to the merits of both the Attorney General's dictum and the decision of the court in *Garcia-Gonzales.* These doubts are verified when we analyze the other cases cited by the Board of Immigration Appeals and recognized with approval by the majority of the First Circuit Court of Appeals in the petitioner's case.

The Ninth Circuit Court of Appeals in *de la Cruz-Martinez* said:

> Deportation is a function of federal and not of state law. In the context of a narcotics conviction, deportation is a punishment independent from any that may or may not be imposed by the states. While it is true

that the same event, the state conviction, triggers both sets of consequences, it would be anomalous for a federal action based on a state conviction to be controlled by how the state chooses to *subsequently* treat the event. . . .

We agree with the Attorney General's position as to what the intention of Congress was, as expressed in "Matter of A ——— F ———", [8] I & N Dec. 429, 445-446, quoted in *Garcia-Gonzales,* supra, 344 F. 2d at 809-810.

de la Cruz-Martinez, 404 F. 2d at 1200 (emphasis added). Certainly, the court speaks in overly broad terms when it implies that no *subsequent* action by the state should affect a federal action based on an initial state conviction. That implication is subject to the same frailities that undermine the Attorney General's overly broad contention that a conviction in the "normal" sense satisfies Congress' intention that the conviction upon which deportation is based be a final one. Moreover, the questionable validity of the Attorney General's interpretation of the congressional intent behind the deportation statute has already been underscored earlier in this petition.

Next turning to *Gonzalez de Lara,* the Fifth Circuit Court of Appeals in construing the effect of the very Texas statute involved in this case merely expressed *doubt* that the expungement procedure actually erases a conviction completely. *Gonzalez de Lara,* 439 F. 2d at 1318. The court accurately pointed out that the Texas statute provides that if the defendant were subsequently convicted of a criminal offense, proof of the prior expunged conviction would be made known to the court. Hence the statute allows use of the expunged conviction only as a factor to be considered in determining punishment after a subsequent conviction.

Thus it is true that under art. 42.12, § 7 of the Texas Criminal Procedure, an expunged conviction remains available only for the limited purpose of being used *after* a subsequent conviction. And then it is used along with the myriad of other factors concerning the background and character of a defendant, suggested by modern day penologists to be referred to in order that the eventual punishment meted out fits the defendant, as well as the crime.

Certainly use for this limited purpose of the fact that an individual was initially convicted should not be interpreted to detract in any *meaningful* way from the expressed legislative intent that the setting aside of a conviction pursuant to § 7 shall release the individual from *all* penalties and disabilities related to the crime. When one considers that under normal presentencing procedures, all manner of considerations are taken into account, not merely convictions which are final, the effect that this permitted use of an expunged conviction has on whether or not the expungement procedure erases a conviction completely is *de minimis.*

Moreover, if one wishes to determine precisely what the Texas legislature intended to be the result when the expungement procedure is applied to cases where individuals are initially convicted of violations involving controlled substances, he need only turn to art. 4476-15, § 4.12 of the Texas Public Health Law enacted in 1973. There the Texas legislature has eliminated any uncertainty as to its intent to *completely* expunge a conviction where a violation of the laws regulating controlled substances are concerned. The statute provides in pertinent part:

> A discharge or dismissal [of a conviction for an offense relating to a controlled substance] under this section *shall not be deemed a conviction for purposes of dis-*

> *qualifications or disabilities imposed by law for conviction of a crime,* including any provision for enhancement of punishment for repeat or habitual offenders.

Tex. Civ. Code Ann., art. 4476-15, § 4.12 (1973) (emphasis added).

We cite the specific language in that statute as evidence of a codification of long-standing legislative intent to expunge convictions *completely* in those cases involving violations of the laws governing controlled substances. Granted other procedures may be followed to expunge convictions of various crimes, *see, e.g.,* Tex. Code Crim. Proc. Ann., art. 42.12, § 7 (Vernon 1966), but where there is doubt as to the completeness of the expungement under these other procedures (as the court in *Gonzalez de Lara* expressed), it seems perfectly proper and sensible to see what the legislature meant to say with respect to marijuana convictions when it took the time to clear up that doubt in this area with a specific statutory enactment.

The court in *Gonzalez de Lara* also paid short shrift to the importance of the "manner in which Texas chooses to deal with a party *subsequent* to his conviction . . . ." In this time of renewed efforts to decentralize control by the federal government and minimize federal intervention in state and local affairs, the Fifth Circuit Court of Appeals' cavalier dismissal of the importance of a *state* procedure to set aside the conviction of a *state* crime is alarming.

Furthermore, in *Garcia-Gonzales,* the Ninth Circuit Court of Appeals cites with approval a prior decision by that court, *Hernandez-Valensuela* v. *Rosenberg,* 304 F. 2d 639 (9th Cir. 1962), wherein it was held that the setting aside of the conviction of a youth offender under the Federal Youth Correction Act (18 U.S.C. § 5021(a)) did not have the effect of expunging the finality of the youth's conviction. And *de la Cruz-Martinez,* another Ninth Circuit case, held that expungement of a youthful offender's conviction pursuant to California law did not nullify the finality, thereby not eliminating the basis of deportability Obviously, those decisions are at direct odds with the decision of the First Circuit Court of Appeals, in *Mestre Morera,* and subsequent decisions of the Immigration and Naturalization Service itself. *Matter of Andrade,* 14 I. & N. Dec. ——— (I.D. 2276) (B.I.A. 1974); *Matter of Zingis,* 14 I. & N. Dec. ——— (I.D. 2270) (B.I.A. 1974).

After reviewing the 1959 opinion of the Attorney General and its progeny, it can hardly be said that the reasoning, apparently relied upon by the Board of Immigration Appeals and cited with approval by the First Circuit Court of Appeals decisions in the instant case, is compelling. To the contrary, what we have shown demonstrates that the reasoning of both Judge McEntee in *Kolios* and Judge Ely in *Kelly* is more logical and more persuasive. Surely, a state determination affecting the finality of a state conviction should be accorded the same respect as the state's determination of the conviction itself. *Kolios,* opinion (McEntee, J. dissenting); *Kelly,* 349 F. 2d at 475 (Ely, J., dissenting). If this is so, then in determining whether or not a conviction is final, as required under 8 U.S.C. § 1251(a)(11), the court must look to the very determination of that issue made by the state involved. *Kelly,* 349 F. 2d at 477 (Ely J., dissenting). Here, by setting aside the conviction and dismissing the indictment, the Texas court has *nunc pro tunc* wiped out the one apparent blemish on the petitioner's otherwise exemplary record as an alien in the United States, and there remains no final conviction upon which a valid deportation order may be predicated.

C. *Justice calls for discretionary relief.*

In addition to the strong legal arguments that justify granting the petitioner's prayer for a writ of certiorari, there are several other factors which justify exercise of the court's direction in behalf of the petitioner in this case.

Without minimizing the importance of the "drug" problem in the United States, one must nevertheless be mindful of the great diversity of opinion concerning whether or not marijuana actually contributes to that problem. Justice seems to require taking the existence of the controversy into account. Given the questions that arise if the controversy is considered, and given the merit in the previous arguments made on behalf of the petitioner in this petition, many serious doubts exist concerning the fairness of the First Circuit Court of Appeals' decision in this case. In fact, both the majority and the minority of the First Circuit expressly recognized the "sympathetic" nature of the petitioner's case. *Kolios,* opinion at 35, 40. Under these circumstances those doubts should be resolved in favor of the petitioner and against his deportation.

Mr. Justice Douglas, speaking for the Supreme Court in another deportation case, said:

> We resolve the doubts in favor of that construction [which does not result in deportation] because deportation is a drastic measure and at times the equivalent of banishment or exile . . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is [absolutely] required . . . .

Fong Haw Tan v. *Phelan,* 333 U.S. 6, 10 (1948).

And six years after the *Fong Haw Tan* decision, the Supreme Court of the United States held that:

> Although not penal in character, deportation statutes as a practical matter may inflict "the equivalent of banishment or exile" . . . and *should be strictly construed.*

Barber v. *Gonzales,* 347 U.S. 637, 642-643 (1954), *quoting in part Fong Haw Tan* v. *Phelan,* 333 U.S. 6, 10, (1948) (emphasis added).

Here, the penal element in the Texas statute is so obviously secondary to the legislative desire to promote an enlightened policy of non-punitive rehabilitation, *cf. Holzapfel* v. *Wyrsch,* 259 F. 2d at 893, that in the spirit of the above quoted philosophy of this Court, the statute should be interpreted strictly and in a light which rewards those individuals who have struggled "for self-improvement, rehabilitation, and worthily contributive citizenship." *Kelly,* 349 F. 2d at 474 (Ely, J., dissenting). The majority in *Kolios* obviously chose not to follow that philosophy. Yet the petitioner is such an individual and deserves every consideration that can fairly be given to him.

One final, but very important argument must be stressed. It is true that the petitioner was not convicted as a youth offender under 18 U.S.C. § 5010(b). However, 18 U.S.C. § 5006(e) defines a youth offender as a person under 22 years old at the time of conviction, and since the petitioner was only 20 years old at the time of the initial conviction, he well could have been initially convicted as a youth offender. It seems clear from the relatively recent opinion written by Chief Judge Aldrich of the First Circuit Court of Appeals in *Mestre Morera,* that if the petitioner had been convicted as a youth offender, the setting aside of the conviction would have "relieve[d] him not only of the usual disabilities of a criminal conviction, but also . . . [would have given] him a second chance free of a record tainted by such a conviction [and hence free of a conviction upon which deportation can be based]."

Mestre Morera, 462 F. 2d at 1032. In view of that language, it would seem to be a cruel twist of justice, if a 20 year old youth were found to be deportable primarily because his initial conviction was set aside pursuant to Texas law, rather than set aside pursuant to federal law, *i.e.*, 18 U.S.C. § 5021(a). In the interest of justice, such a finding is not warranted.

Thus, compassion, as well as understanding, logic, and law, call for the court to exercise its discretion in a way which will allow this young man to remain in the United States and, together with his family, continue to make a positive contribution to our society.

Conclusion.

Since the initial state conviction upon which the petitioner's deportation order is based was subsequently set aside pursuant to a valid state procedure, the expunged conviction does not constitute a final conviction upon which a valid deportation order may be predicated. Hence, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the First Circuit affirming the decision of the Board of Immigration Appeals should be reversed with the order of deportation entered by the Immigration Judge vacated.

Respectfully submitted,

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May 20, 1976.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1264

IOANNIS GEORGIOS KOLIOS,
PETITIONER,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Ronald I. Bell, with whom *Robert H. Goldman* and *Goldman, Curtis, Cashman, Leahey & Latham* were on brief, for petitioner.

Robert E. Courtney, III, Attorney, Department of Justice, with whom *B. Franklin Taylor*, Acting Chief, Government Regulations Section, Criminal Division, and *James P. Morris, Attorney*, Department of Justice, were on brief, for respondent.

March 30, 1976

COFFIN, *Chief Judge*. Petitioner, a native and citizen of Greece, entered this country in 1968 as a lawful immigrant. In 1972, at 20 years of age, while serving in the armed forces of the United States, he pleaded guilty to selling marijuana in violation of Texas law, and was sentenced to five years in prison. Imposition of sentence was suspended and petitioner was placed on probation. In 1973, he was found deportable under 8 U.S.C. § 1251(a)(11), which provides for the deportation of an alien who, *inter alia*, "has been convicted of a

violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana". However, he had not yet been deported when, in 1975, he fulfilled his conditions of probation and his conviction was set aside by the Texas court. Petitioner thereupon took his case to the Board of Immigration Appeals, urging reversal on the ground that he was no longer "convicted" within the meaning of the Immigration and Nationality Act. The Board rejected this contention and the instant petition for review followed.

The judicial precedents, as petitioner recognizes, support the Board's decision.[1] They stem from the Attorney General's ruling in *Matter of A—F—*, 8 I. & N. Dec. 429 (1959) (dictum). Prior to that decision, state expungement statutes were traditionally given effect by the Board of Immigration Appeals, both as to expungement of crimes involving moral turpitude (§ 1251(a)(4)), and as to narcotics offenses (§ 1251(a)(11)).[2] But in 1956 Congress had amended § 1251(b), under which deportation for crimes involving moral turpitude could be avoided by an executive pardon or by a judicial recommendation against deportation made at or within 30 days after the time of sentencing, to make it clear that the section was inapplicable to the narcotics offenses described in § 1251(a)(11).[3] The Attorney General

[1] *See, e.g., Gonzales de Lara* v. *United States*, 439 F.2d 1316 (5th Cir. 1971); *Cruz-Martinez* v. *INS*, 404 F.2d 1198 (9th Cir. 1968), *cert. denied*, 394 U.S. 955 (1969); *Kelly* v. *INS*, 349 F.2d 473 (9th Cir.), *cert. denied*, 382 U.S. 932 (1965) *Garcia-Gonzales* v. *INS*, 344 F.2d 804 (9th Cir.), *cert. denied*, 382 U.S. 932 840 (1965). *See generally* C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 4.17 and notes 22-23c (October 1975 Supp.).

[2] See the provisions cited by the Board in *Matter of A—F—*, *supra*.

[3] 8 U.S.C. § 1251(b) provides:

"The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

reasoned that the progressive strengthening of deportation laws affecting aliens involved in narcotics,[4] capped by the 1956 amendment, evidenced a national policy which would no longer permit such a flexible interpretation of "convicted" as to recognize a subsequent expungement under state procedures having nothing to do with the merits. He also noted that his view would avoid making deportability depend upon the fortuity of a state expungement law. For 17 years this rationale has been accepted by judicial decision, with no contrary action on the part of Congress.

Petitioner, however, presents a sympathetic case. He is young. His crime appears to have been near the minimum in the drug spectrum. He so conducted himself while under probation that the Texas court set aside his conviction and dismissed the indictment against him. Under Texas law this meant that for most purposes the conviction became nonexistent.[5] He questions why he should be deported when someone convicted of a crime of moral turpitude could avoid

[4] The Alien Registration Act of 1940, 54 Stat. 673, had amended the provision for deportation of alien narcotics offenders to (1) eliminate the requirement of a sentence upon the conviction, and (2) encompass convictions of state, as well as federal narcotic laws.

[5] ". . . Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, . . . shall discharge the defendant . . . . [S]uch court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense." Texas Code Crim. Proc. Ann. art. 42.12, § 7 (Vernon 1966).

deportation by obtaining the same order of expungement.[6] He also notes that had he been convicted for a narcotics offense under federal law and dealt with under the Federal Youth Corrections Act, he would not be deported following expungement, *Mestre Morera* v. *INS*, 462 F.2d 1030 (1st Cir. 1972); *Matter of Zingis*, 14 I. & N. Dec. — (I.D. 2270) (B.I.A. 1974). Further, the Service now accords recognition to state expungements of marijuana offenders treated and expunged under state juvenile statutes, *Matter of Andrade*, 14 I. & N. Dec. — (I.D. 2276) (B.I.A. 1974). In light of the currently ambivalent community and Congressional attitudes toward minor marijuana offenses, *see* 21 U.S.C. §§ 186, 844 (1970), the policy of construing deportation laws strictly against deportability, *Barber* v. *Gonzales*, 347 U.S. 637 (1954), and the legitimate goal of stimulating rehabilitation behind any expungement statute, he contends that the time has come to ameliorate the harshness of the rule initiated by the 1959 opinion of the Attorney General.

Recognizing the force of the argument, and of our brother's dissent, we nevertheless must start with the proposition that deportation is a matter of Congressional policy, *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-67 (1972). In *Mestre Morera, supra*, we held that the Congressional policy of deportation for narcotics offenders conflicted with another Congressional policy of rehabilitation for young offenders whose convictions were erased under the Federal Youth

[6] The Board and the Attorney General have continued to recognize the effect of expungements under § 1251(a)(4), *Matter of G—*, 9 I. & N. Dec. 159 (A.G. 1961). This accords with the tenor of § 1251(b): *see* Comment, 114 U. Pa. L. Rev. 372 (1966). However, the decisions cited in note 1, *supra*, rely less upon this distinction than upon perceptions (1) of a need to avoid vagaries of different state post-conviction laws and (2) that such statutes do not really affect the validity of the conviction. Accordingly, there have been rulings that state expungement statutes are ineffective for deportation purposes under § 1251(a)(4), *Burr* v. *INS*, 350 F.2d 87 (9th Cir. 1965) (rejected by the Board and the Attorney General in *Matter of Ibarro-Obando*, 12 I. & N. Dec. 576 (A.G. 1967)), and under § 1251(a)(14) (violation of laws relating to automatic and semi-automatic weapons or sawed-off shotguns), *Gutierrez-Rubio* v. *INS*, 453 F.2d 1243 (5th Cir. 1972).

Corrections Act.[7] Finding no express preclusion of such erasure as a defense to deportation, we held that Congress must have intended the FYCA expungement provisions to be fully effective even after the 1956 amendment of § 1251(b) which closed the doors of pardon and judicial recommendation against deportation to drug offenders.[8] We said that if Congress had intended such expungement to be "inoperative with respect to section (a)(11), it would have expressly said so."

The doctrine of *Mestre Morera* has been extended by the Board of Immigration Appeals to orders effecting erasure of minor marijuana convictions und state juvenile laws. This practice is consistent with the Congressional policy, at least as interpreted by *Mestre Morera*, that statutory schemes aiming at the rehabilitation of youthful offenders should be given full effect.[9]

[7] We noted that the federal act was more than a "technical erasure", and did more to free the defendant from all taint of conviction than the mere restoration of his civil rights, citing *Tatum* v. *United States*, 310 F.2d 854 (D.C. Cir. 1962). By contrast, the state statutes generally, including the one in question, purport basically to simply restore civil rights by releasing the defendant from the "penalties and disabilities" of his conviction.

The Texas statute involved here provides that the conviction be made known to the court if the defendant is convicted of another crime. According to annotation 26.5 to this statute, the Texas Attorney General, in opinions No. M-640 (1970) and No. M-795 (1971), interprets the expungement to restore civil rights such as the right to vote and to be a juror, but not to allow the defendant to state on an application for employment that he has never been convicted.

Some expungement statutes are even less effective. For example, the California statute at issue in *Garcia-Gonzales, supra* note 1, appears to have been hedged with numerous exceptions. A Louisiana statute allows use of the conviction for recidivist purposes, *see Matter of Cruzado*, 14 I. & N. Dec. (I.D. 2252) (B.I.A. 1973). *But see Tsimbidy-Rochu* v. *INS*, 414 F.2d 797 (9th Cir. 1969), refusing to respect a Nevada statute without any indications that such exceptions exist.

[8] We recognize that deference to the Congressional policy of deportation of aliens involved in narcotics traffic might be more compelling "when the expunction is of a state conviction under an unusual state procedure", citing some of the authorities in note 1, *supra*, and *Matter of A—F—*, *supra*, but felt that the Youth Corrections Act, contemplating more than a "technical erasure", had expressed a Congressional concern of equal strength to that of its concern with narcotics. 462 F.2d at 1032.

[9] This is particularly appropriate in view of the fact that when the underlying facts of a case involve violations of both state and federal law, and sur-

To go beyond this point and recognize other expungement statutes as barriers to deportation is, we think, to go beyond the Congressional policy evidenced by its excepting narcotics offenses from the saving effects of a pardon or a judicial recommendation against deportation. One can argue that neither judicial recommendations nor many pardons purport to set aside convictions, that they are motivated as much by mercy as by rehabilitation, and that successful invocation of an expungement statute necessarily implies satisfactory completion of a term of probation — concrete evidence of rehabilitation. Yet a pardon by the President or a Governor is a solemn and deliberate act by the highest official of the nation or a state. And a judicial recommendation against deportation, after representations from prosecution and immigration officials, is another deliberate and focused action. That such actions should be unavailing to forestall deportation while orders of expungement in whole classes of like cases following successful completion of probationary terms would suffice seems to us to draw too fine a line.

We note also the blanket nature of state expungement statutes. As is true of the statute in this case, the narcotics offense could range from simple possession of marijuana to wholesale distribution of hard drugs. So long as the trial judge deems probation appropriate, expungement is a possibility. Yet Congress, when it has moved to ameliorate sanctions in narcotics cases, has taken a selective approach. In its 1970 amendment to 21 U.S.C. § 844, it provided for the possibility of expungement, but limited the possibility to cases of simple possession of a controlled substance, and

render to state juvenile authorities is being contemplated under 18 U.S.C. § 5001, "it is generally the practice that the less serious offenses are handled by state prosecution, and that federal prosecutions are reserved for the more serious offsenses." *Matter of Andrade*, 14 I. & N. Dec. ..... (I.D. 2276) (B.I.A. 1974), App. at 11 (letter of U. S. Solicitor General Bork).

provided more complete expungement for young offenders. Counsel have provided us with bills introduced into the current 94th Congress which seek with similar precision to exclude as bases for deportation convictions for possession of marijuana or for distribution of a small amount of marijuana for no remuneration.[10] It seems highly unlikely to us that Congress, which has narrowly confined the scope of expungement of conviction in federal drug cases, would contemplate that state expungement statutes of general applicability could insulate any narcotics offender from the sanction of deportation.[11]

Were we dealing with the amendment to § 1251(b) as a new statute, we might feel free to give greater weight to the principle of strictly construing a deportation provision. But the amendment has been on the books for twenty years; judicial and administrative interpretations, although not many, have been consistent; and such amelioration of sanctions as Congress has allowed for federal drug offenders has been narrowly defined. We conclude, not without some hesitancy, that relief in such cases as this is properly a matter for the Congress. We add our own view that some flexibility would appear to be desirable; automatic deportation of all drug offenders, despite conviction for a minor offense,

[10] H.R. 223 (Rep. Bingham) would add to the last sentence of § 1251(b) an exception for convictions of possession of marijuana or its distribution in a small amount for no remuneration, and would allow an Attorney General waiver of deportation in such cases. H.R. 367 (Rep. Koch) would add a subsection to § 1251(b) allowing the Attorney General to waive deportation under § 1251(a)(11) for convictions for possession of marijuana. H.R. 2593 (Rep. Koch) would provide that § 1251(a)(11) not apply to convictions for possession of marijuana or the distribution of a small amount of marijuana for no remuneration, or for certain instances of simple possession of controlled substances. S. 448 (Sen. Cranston) would add to the last sentence of § 1251(b) an exception for an alien deportable under § 1251(a)(11) for a conviction of the possession of marijuana, or its distribution in a small amount for no remuneration, if the alien has an immediate relative living in the United States and the Attorney General waives deportation.

[11] A closer question would be posed if a young offender's state conviction for simple possession had been expunged. In such a case it could be argued that he should be treated no more harshly than he would have been under 21 U.S.C. § 844.

satisfactory completion of a probationary term, and erasure of the conviction by the concerned state, would seem to serve no national interest.

The petition for review is denied.

McENTEE, *Circuit Judge* (dissenting). While not discounting the persuasiveness of the majority's opinion in this case I nonetheless must dissent. This case is a difficult one — in terms both of its human dimensions and of the problems of statutory construction which it involves. While I have striven to avoid permitting the sympathetic aspects of petitioner's situation to control, I have been influenced in my approach to the statutory language by the consistent line of Supreme Court decisions which hold that in deciding whether a given statute requires the deportation[1] of an alien, doubts as to the correct construction of the statute should be resolved in the alien's favor. "[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). *See also Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214, 225 (1966); *Barber* v. *Gonzales*, 347 U.S. 637, 642 (1954). *Cf. Guiseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J.)

[1] The consequences of deportation are often very grave for the individual involved. Deportation may result in the loss "of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.). It can be the equivalent of banishment or exile. *Delgadillo* v. *Carmichael*, 332 U.S. 385, 391 (1947).

The statute we must construe here does not directly address the situation of state expunction laws. While Congress specifically closed off the avenues of pardon and judicial recommendation against deportation to drug offenders, it said nothing about the effect of expunctions under state law (or about federal expunction under the Youth Correction Act [YCA]). In *Mestre Morera* v. *INS*, 462 F.2d 1030 (1st Cir. 1972) we followed the rule of strict construction and held that if Congress had intended federal YCA expunction to be inoperative from barring deportation it would have expressly said so. I believe a similarly strict construction is mandated here. We also noted in *Mestre Morera* that Congress through the Youth Correction Act, had expressed a "concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions."[2] 46, F.2d at 1032. The fact that Congress chose to intertwine the criminal justice systems of the states with deportation decisions in no way alters its clearly manifest concern with rehabilitation.

Furthermore, I do not share the majority's concern over the possible non-uniformity which might result from giving effect to the rehabilitative purposes of state expunction laws. In this as in other areas Congress has frequently made federal laws dependent on state statutes, *see, e.g.*, 18 U.S.C. App. § 1202(c)(2); *see also* 18 U.S.C. § 1955(b)(1)(i). Congress has clearly bargained for and manifested an acceptance of the variety that necessarily flows from making deportation dependent on state convictions. Since Congress knew of the existence of state expunction provisions and the fact of their diversity, it could hardly have been unaware

[2] As the majority correctly notes, had petitioner been convicted of a narcotics offense under federal law and dealt with under the Federal Youth Corrections Act (for which he would have been eligible, see 18 U.S.C. § 5006(e)) he would not be deported following expunction.

that such statutes might have a different scope than comparable federal provisions. Hence, I think we should be reluctant to strain toward uniformity where Congress has clearly countenanced variety through a system which partially relies on state laws. Such a system necessarily must involve "sensitivity to the legitimate interests of both State and National Governments, and . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [should] always endeavor . . . to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

I dissent.

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APPENDIX B.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No.: A18 010 333 — Boston, Massachusetts District
November 15, 1973

IN DEPORTATION PROCEEDINGS

In the Matter of IOANNIS G. KOLIOS — Respondent —
CHARGE: I & N Act Sec. 241(a)(11) (8 USC 1251(a)(11)) convicted of violation of the law relating to unlawful sale of marijuana.

APPLICATION: None.

IN BEHALF OF RESPONDENT:

Efthemios Bentas, Esq.
100 Merrimack Street
Lowell, Massachusetts

IN BEHALF OF SERVICE:

Ralph J. Smith
Trial Attorney
Boston, Massachusetts

ORAL DECISION OF IMMIGRATION JUDGE

This record relates to a 21 year old male alien, a native and citizen of Greece. He was admitted into the United States as an immigrant on or about March 13, 1968. He was, on May 1, 1972, convicted in the District Court, Bexar County, Texas of the sale of marijuana in violation of the laws of the State of Texas.

The respondent admits that the factual allegations in the Order to Show Cause are true, and he has identified the record of his conviction. His admissions to the factual alle-

gations in the Order to Show Cause, together with the record of his conviction are clear, unequivocal, and convincing evidence that he is deportable as charged.

The respondent neither admitted or denied deportability as charged. Counsel stated on his behalf that a motion has been made through the attorney who originally handled the case in Texas for a new trial. He stated that there will be a hearing on the motion for a new trial probably within the next two weeks, and that the attorney in Texas has given him hope that at a new trial the respondent may be found to be not guilty or, if guilty, guilty of some offense other than the charge of unlawfully selling marijuana.

The respondent is 21 years of age. It was represented on his behalf that he has never had difficulties with law enforcement authorities except for this conviction in Texas. He testified that his father, his mother, and his sister are all lawful permanent residents of the United States, and his father is now an applicant for naturalization.

Notwithstanding the respondent's close family ties in the United States, the fact that he has no criminal record other than his conviction as aforesaid, and the fact that upon this conviction he was not required to serve any sentence of imprisonment, on this record no order can be entered in his case except that he be deported.

The Order to Show Cause in this case was issued on May 22, 1973, approximately 6 months ago. The hearing was originally scheduled for July 11, but it was deferred so that counsel could seek court review of the conviction on which it is based. Futher deferrment of the hearing was requested, and the matter was referred to the District Director for his determination as to whether the case might be placed in some deferred status and removed from the docket of hearings. However, the District Director determined that these proceedings should go forward, and that he will consider the question of deferrment of action thereafter.

It must be ordered that the respondent be deported. He has elected in the event he is ordered to be deported, that he be deported to Greece.

For the purpose of this decision the allegations of fact contained in the Order to Show Cause are adopted as findings of fact, and the charge as to deportability contained in the Order to Show Cause is adopted as a conclusion of law. ORDER: IT IS ORDERED that the respondent be deported from the United States to Greece on the charge contained in the Order to Show Cause.

/s/ EUGENE C. CASSIDY
EUGENE C. CASSIDY
Immigration Judge

APPENDIX C.

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

May 9, 1975

File: A18 010 333 — Boston

In re: IOANNIS GEORGIOS *KOLIOS* aka
JOHN KOLIAS aka
JOHN KOLIOS

IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:

Efthemios Bentas, Esq.
100 Merrimack Street
Lowell, MA 01852

CHARGE:

ORDER: Section 241(a)(11), I&N Act (8 U.S.C. 1251 (a)(11)) — Convicted of violation of the law relating to unlawful sale of marijuana

APPLICATION: None

This is an appeal from a decision of an immigration judge dated November 15, 1973, finding the respondent deportable under section 241(a)(11) of the Immigration and Nationality Act and ordering his deportation to Greece. The appeal will be dismissed.

The respondent is a single male alien who is a native and citizen of Greece. He was admitted to the United States as a lawful permanent resident on March 13, 1968.

Under section (a)(11) of the Immigration and Nationality Act, an alien in the United States is deportable if, at any time after entry, he has been convicted of a violation

of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana.

On May 1, 1972, the respondent was convicted in the District Court of Bexar County, Texas, for the crime of sale of marijuana. The respondent's sentence of confinement was suspended, and he was placed on probation.

Counsel for the respondent has now submitted to us a copy of an order from the Texas court, dated February 4, 1975, setting aside the respondent's conviction and dismissing the indictment. Counsel contends that the basis for deportability has now been removed.

The source of the court's authority to enter its order expunging the respondent's conviction is not apparent from the face of the order. However, the order recites that it was being entered after it having been shown that the respondent has "satisfactorily fulfilled the conditions of probation imposed against him." This type of proceeding is authorized under Texas statutes. See Texas Code of Criminal Procedure, Art. 42.12, section 7. Such an expungement, however, does not serve to eliminate the basis of deportability for purposes of section 241(a)(11) of the Act. *Matter of A-FO* 8 I&N Dec. 429 (A.G. 1959); see also *Garcia-Gonzales* v. *INS,* 344 F. 2d 804 (9 Cir. 1965), cert. denied 382 U.S. 840 (1965); *Cruz-Martinez* v. *INS,* 404 F. 2d 1198 (9 Cir. 1968), cert. denied 394 U.S. 933 (1969); *Gonzalez de Lara* v. *INS,* 439 F. 2d 1316 (5 Cir. 1971).

No showing has been made that the respondent, who was under twenty-one at the time of his conviction, was sentenced under a Texas equivalent to the Federal Youth Corrections Act. The expungement thus does not fall within the rule enunciated in *Matter of Andrade,* Interim Decision 2276 (BIA 1974). Indeed, the order of probation indicates that the respondent was treated as an adult offender.

We are thus satisfied that the respondent's conviction is final for purposes of deportation and that the order setting aside his conviction has not removed the basis for deportation under section 241(a)(11). His deportability has been established by clear, convincing and unequivocal evidence.

The respondent has made no application for discretionary relief. However, we note that the record shows that at the time of his conviction, the respondent appeared to be in military service. The record does not show the length of that service, or the character of his separation from active duty. The respondent's parents are lawful permanent residents. The only form of relief which the respondent could statutorily qualify for is suspension of deportation, but only if he meets the requirements of section 244(b). The record does not establish that those requirements can be met.

The decision of the immigration judge was correct. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

DAVID L. MIEHOLLAN
Chairman